IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 739 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMEX FOOD INDUSTRIES THRO' MANAGER, - Appellant
Versus
STATE OF GUJARAT & 1 - Respondents

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Appearance :
MR ANSHIN H DESAI for Appellant:
MR M.A. PATEL, LD. APP for Respondent : 1,
MR TV SHAH for Respondent: 2,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 19/03/2007

ORAL JUDGMENT

Heard learned counsels for the parties.

1. The appellant original complainant has preferred

this appeal under Section 378 of the Code of Criminal Procedure, challenging the order of acquittal dated 31/7/2001 passed by learned JMFC, Junagadh, in Criminal Case No. 4642 of 1997 acquitting the present respondent no.2 of the charge of committing offence punishable under section 138 of the Negotiable Instrument Act, 1881. This Court [Coram: C.K Buch,J] vide order dated 14/3/2002 granted leave and admitted the appeal. Today it is taken up for final disposal.

2. Brief facts leading to filing of this appeal deserve to be set out as under:

The complainant was constrained to lodge complaint before the Court of learned JMFC, Junagadh, against the proprietor and owner of “Om Agency “ - the accused, as the cheques alleged to have been issued by him for Rs.13,591=00 dated 26/4/1997 and for Rs.9632=00 also dated 26/4/1997 received by him towards payment of outstanding dues had been returned. The earlier cheque was for insufficiency of funds and second cheque for the reason that the payment was stopped by the drawer. The complaint came to be registered as Criminal Case No. 4642 of 1997. After summoning the accused, his plea was recorded and the trial begun. After recording evidence of both the sides trial court put the same to the accused and accordingly his

statement under section 313 of the Criminal Procedure Code came to be recorded. The accused denied the case of the prosecution and the trial court came to the conclusion that the complainant could not establish his case against the accused so as to bring home guilt on the part of the accused so as to convict and punish him under section 138 of the Negotiable Instrument Act (hereinafter referred to as 'N.I. Act' for brevity) and acquitted him vide order dated 31/7/2001, which is impugned in the present appeal under section 378 of Criminal Procedure Code by the original complainant.

3. Shri. Anshin Desai, learned counsel appearing for the appellant has submitted that the order of the trial court passed by the Trial Court is patently erroneous and contrary to the facts on record and therefore same should be quashed and set aside. The trial court has basically relied upon the decision of this Court in case of SHANKU CONCRETES PVT. LTD. & ORS Vs. STATE OF GUJARAT & ANR, reported in 2000 (2) GLR pg. 1705, and acquitted the accused on the ground that when the cheque was issued at that time no liability existed and therefore no offence was made out under section 138 of N.I. Act. Shri. Desai has submitted that this decision of the High Court has been reversed by the Apex Court in the SLP preferred by the respondent therein, in case of BALBHADURASINH

INDRASINHJI ZANA Vs. SHANKU CONCRETE (PVT) LTD & ORS, in Criminal Appeal No. 110 of 2001 reported in 2005 (3) GLH pg. 685. Shri. Desai has submitted that the judgment & order of acquittal being erroneous and contrary to the facts on record it deserved to be quashed and set aside. Shri. Desai has submitted that testimony of the accused recorded at exhibit-64 go to show that so far as the cheque amount of Rs.9,632=00 is concerned he has admitted that the goods had been received against said cheque and therefore it can not be said that he has discharged successfully the burden cast upon him to prove that the cheque in question had not been issued against any existing liability. Shri. Desai has therefore submitted that, in view of this matter the trial Court ought not to have recorded the acquittal ignoring the say of the accused himself at exhibit-64 where he himself has admitted this fact. Shri. Desai has therefore submitted that, in view of these, the order of acquittal deserve to be quashed and set aside.

4. Shri. T.V. Shah, learned counsel appearing for the respondent no.2/ original accused submitted that this being an acquittal appeal, the acquittal order may not be disturbed unless & until it is made out that the acquittal order has resulted into miscarriage of justice because of the perverse view taken by the trial court.

Shri. Shah has submitted that in the acquittal appeal the respondent / accused has a right to support the order of acquittal even on the grounds which are independent and different than those weighed with the trial court for passing the acquittal order. Shri. Shah has further submitted that the decisions of Karnatak High Court in case of (i) M/S SHREYAS AGRO SERVICES PVT. LTD V. HANDRAKUMAR, S.B., reported in AIR 2006 (NOC) 1168 (Kant.); (ii)in case of M/S. KEYGIEN GLOBAL LIMTED V. M/S. MADHAV IMPEX & ANR, reported in AIR 2006 (NOC) 1307 (Kant.); and (iii) in case of M/S. SATHAVAHANA ISPAT LTD V. UMESH SHARMA, reported in AIR 2006 (NOC) 1568 (Kar.) is that the blank cheques agreeing to the amount payable remains to be a cheque towards security only and the same can not be said to be capable of raising any liability so as to invite rigors of section 378 of Cr.P.C. and returning of such cheque without payment can not be therefore visited with penal liability under section 138 of N.I. Act. Shri Shah has further submitted that the fact remains to be noted that the cheque in question was not having any characteristic of even a post dated cheque. The purports of post dated cheque have been described by the Apex Court in case of ASHOK YESHWANT BADAVE Vs. SURENDRA MADHAVRAO NIGHOJAKAR AND ANOTHER, reported in (2001) 3 SCC, 726. Looking to this it can be said that the post dated cheque is certainly a cheque

though bearing future date but clearly indicating the amount of liability that would be created on the drawer and that amount becomes payable on the date mentioned on the face of the instrument. In the instant case as it is admitted, the cheque do not bear the date itself.

5. Shri. Shah has submitted that in view of these, even if another view is plausible in acquittal appeal, this Court may not disturb the order of acquittal as can be seen from the order of acquittal that it has not been resulted into miscarriage of justice.

6. This Court heard learned counsels of the parties at length, perused the records & proceedings. The undisputed facts deserve to be noted are;

The cheques in question were lying with the complainant and as it has come out from the record that this practice was accepted by both the parties that the blank cheques used to be delivered to the complainant by the accused. Of course the letter at Mark-A indicating that blank cheques were demanded by the complainant remained to be proved and therefore it has not been given any exhibit number. However from the testimony of the complainant this fact has emerged unequivocally that there was a practice

of getting signed cheques from the accused by the complainant. The cheque in question namely cheque for Rs.13,591=00 though bounced the complainant has admittedly given up his case and therefore trial court was constrained to observe that the complainant did not come to the trial court with clean hands. The complainant confined his entire case only to second cheque for Rs.9632=00 which is at exhibit-28. So far as the amount of Rs.13,591=00 is concerned, original cheque was not available on the record and the same has not been produced on record. As against this, it deserves to be noted that the accused has produced the relevant extract of books of account maintained by the complainant in respect of the accused's account which is at exhibit-33. This document came to be exhibited during cross-examination of the complainant. This books of account is containing the entries of Rs.13,591=00 and also amount of rs.9,632=00 but the same has been unexplained. A duty was cast upon the complainant to explain the entries made therein for supporting his case. The entries in this record have admittedly not been explained.

7. The Apex Court has in case of M.S. NARAYANA MENON @ MANI V. STATE F KERALA & ANR., reported in AIR 2006 S.C. pg. 3366 observed that the burden of rebutting the presumption arisen out of provision 139 and 118 of N.I. Act is initially upon the accused but once the accused

indicate from the testimony of the complainant and other documents produced by the complainant that the case of the complainant is far from being probable and his defence is quite probable then it can be said that accused has discharged his initial burden and thereafter the burden shifts upon complainant to make out his case. In the instant case therefore when relevant extract of books of account maintained by the complainant were produced by the accused during cross examination coupled with the testimony of the accused himself that there used to be practice of keeping blank signed cheques with the complainant it can well be said that the defence had probabilised its theory and had successful in shifting burden upon the complainant to explain the entries made in the books of account. The complainant has failed in explaining this and therefore the order of acquittal can not be said to be suffering from any infirmity.

8. Shri. Desai has at this stage made a request that, if this Court is not inclined to accept the submissions, at least, so far as the second cheque is concerned, as there is no explanation, the matter deserved to be remanded. This request is also not accepted in view of the reasonings adopted by this Court that the consensus between the parties in respect of the cheque amount have never been arrived at and therefore the cheque

appears to have been used or rather misused by the complainant so as to fasten criminal liability upon the accused. In this view of the matter, no useful purpose is likely to be served by remanding the matter. Therefore this request can not be accepted.

9. The trial Court's finding in respect of post dated cheque based upon this Court's decision in case of Balbhadurasinh (Supra) cannot be sustained and accordingly it is reversed. But the order of acquittal deserved to be confirmed on the basis of discussion made hereinabove. The order of acquittal is confirmed as looking to the record, it can be said that the complainant has not made out his case against the accused so as to bring home guilt on his part.

10. In the result, the order of acquittal deserves to be confirmed and is hereby confirmed. The appeal is dismissed accordingly.

[S.R. BRAHMBHATT, J]

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